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No. 81-143
IN THE

Supreme Court of the United States

October Term, 1981

STURM, RUGER & CO., INC.,

Petitioner,

vs.

MICHAEL JAMES DAY,

Respondent.

BRIEF IN OPPOSITION TO STURM, RUGER'S PETITION FOR CERTIORARI

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STATEMENT OF THE CASE

STURM, RUGER'S[1] Statement of the Case is inaccurate and misleading in that it attempts to blame DAY for the accident and describe STURM, RUGER as a poor, innocent manufacturer beset with unwarranted litigation, particularly instigated by this writer. We will attempt to correct those misleading implications.

MR. DAY purchased the gun in question new from Frontier Sporting Goods in Fairbanks, Alaska on June 1, 1972 [Tr. III, 44][2]. This accident occurred only two months later on June 30, 1972 [Tr. III, 91]. MR. DAY was a college student working as a cook at the time of the accident in Tok, Alaska [Tr. III, 92-94]. Prior to this accident, he had only shot the gun approximately 50 to 100 times [Tr. III, 91-92]. MR. DAY was an outdoorsman who enjoyed hunting, fishing, camping and hiking [Tr. III, 93-95] and he purchased the revolver and used it for protection against bears in Alaska [Tr. III, 88, 95]. MR. DAY'S father had owned an identical gun [Tr. III, 88] and had instructed him on the proper use of the gun [Tr. III, 90]. Neither he nor his father were aware of the inherent dangers of this particular gun [Tr. III, 97, 107-108][3].

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[1]We will refer to the parties as Petitioner has [see fn. 2, p. 2, Petitioner's Brief].

[2]The record will be referred to by Tr. for Transcript, followed by the Volume of the Transcript, and the page number.

[3]It was established at trial that this type gun will accidentally fire if the hammer is in its rest position by a slight blow to the rear of the hammer [Tr. VII, 30; IX, 103-104; X, 151-152]; if the hammer is in the false safe position by a slight blow to the hammer or a slight blow to the trigger [Tr. VII, 30-31]; if in the safety notch by pulling the trigger [Tr. VII, 31; IX, 104; X, 151-152] or a blow to the hammer [Tr. VII, 31; IX, 104; X, 151-152]; if in the load position by pulling the trigger; and from the false load position by pulling the trigger [Tr. VII, 30; IX, 119; X, 151-152]. In short, the remarkable design of this handgun permits it to accidentally go off any time it is loaded, even while uncocked with the safety engaged and without pulling the trigger. It is difficult to conceive of a more dangerous machine. Consequently, the design has resulted in probably the most tragic accident record ever experienced in the firearms industry, and perhaps the worst accident record ever experienced by the American manufacturing industry [to be discussed herein below relating to Petitioner's footnotes 18 and 19].

The trial experts generally agreed that the public assumed that the revolver could be fired only when cocked and by pulling the trigger and did not know the gun would fire otherwise [Tr. III, 43-45; IV, 135]. Unfortunately, MR. DAY, like the majority of the general public, was not aware of the design weaknesses of this model gun. The accident occurred when DAY was preparing to take his employer's son fishing. He intended to drop his employer's daughter at a movie in Tok and he naturally took the gun along for bear protection while fishing* [Tr. III, 97-98]. MR. DAY decided to unload the gun before proceeding down the highway and with the pickup door open [Tr. III, 51], he pointed the gun away from everyone at the floor, put the hammer in the unload position — the only method in which the gun may be unloaded — and proceeded to unload it [Tr. III, 51, 74, 97-98]. On cross-examination, STURM, RUGER tried to establish that the truck was crowded and that the steering wheel was an obstruction, but to no avail [Tr. III, 98, 147]:

"Q. Let me ask you this; when you were reaching down like that in this car, was the steering wheel blocking your view or in your way in any fashion?

A. No.

Q. The steering wheel wasn't in your way?

A. No.

Q. Your face was far enough back so you didn't get near the steering wheel?

A. Right."

Each eye witness was asked about crowding and obstructions and each denied that there was any crowding or obstructions at all [Tr. III, 58, 60-61, 81]. The gun was being unloaded in a careful, normal fashion pointed away from people. When it slipped, MR. DAY prudently grabbed it to avoid it falling and the gun went off [Tr. III, 161-162]. The result was that an uncocked .41 magnum revolver shot MR. DAY in the shin at at close range, hundreds of miles and hours from the nearest hospital, resulting in serious injury to his leg.

*Sturm, Ruger erroneously asserts that Day had been shooting the gun with the two children prior to the accident and that is incorrect.

Unfortunately, for the people who have patronized this company, DAY is not alone in having sustained a very serious injury as a result of STURM, RUGER'S marketing misconduct[3]. Without citation to this record, STURM, RUGER lists 33 cases which have been filed against it in footnotes 18 and 19 on pp. 22 and 23 of its Brief, and in which this writer has either represented the Plaintiff or has been associated with out-of-state counsel in representing the Plaintiff[4]. What STURM, RUGER does not tell the Court is that its files also reflect that in 1978, Mr. Dearden, the person in charge of product liability at Sturm, Ruger, testified that STURM, RUGER had received notice of between 150 and 200 accidents with this particular gun and since then, it has reported well in excess of 50 additional accidents to the Securities & Exchange Commission. In 1980 alone, STURM, RUGER reported to the Securities & Exchange Commission, through its 10-K Report, that it had been notified of 50 accidents involving firearms manufactured by the company and of those 50, it described 24 of the claims in detail. Of those 24 claims, 22 of them involved this one type gun [The 1980 10-K Report is attached as Exhibit 2 to DAY'S Memorandum in Support of Motion to Set Aside Stay of Enforcement of Judgment

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[3]Sturm, Ruger's marketing misconduct is now cited as an example of the worst manufacturing misconduct known of in American history:

> "We must acknowledge, and *Ford* does not argue otherwise, that there are several documented instances of manufacturers who knowingly and recklessly breached the tort rules of product safety.
>
> "In *Sturm, Ruger & Co., Inc.* v. *Day*, 594 P.2d 39, 47 (Alaska 1979), the evidence presented at trial indicated that top officials at Sturm, Ruger knew that the safety and loading notches of their single action revolver presented a danger of accidental discharge because of the propensity of the engaging middle parts to fail or break; that the management of Sturm, Ruger knew that serious injuries had resulted from this deficiency; and that the management procrastinated in changing the basic design, at an increased cost of $1.93 per gun." *Wangen* v. *Ford Motor Co.*, 294 N.W.2d 437, 449 (Wisc. 1980).

[4]Actually, the list is inaccurate in that this office did not represent Tim Zahrte, but does represent Mr. Cain injured in Louisiana; the Ervin family for Mrs. Ervin's injury in Washington; Mr. Duel injured in Montana; Ms. Black whose case is pending in Arkansas; Mr. Morgan injured in Mississippi; Mr. Schall in South Carolina; and Mr. Tolley in Virginia.

Pending Petition for Certiorari filed with the Alaska Supreme Court June 16, 1981].

What is more unfortunate for the consuming public is that the RUGER CORPORATION, with sales in excess of $80 million in 1980 alone [see Exhibit 5 to DAY'S Memorandum in Support of Motion to Set Aside Stay of Enforcement of Judgment Pending Petition for Certiorari] is controlled by MR. RUGER personally who owns in excess of 50% of the stock in the company [Tr. XV, 48; XVI, 179-180]. MR. RUGER has twice testified that regardless of the jury verdict in this case, and the ever increasing tragic accidents, he will not recall this remarkably unsafe gun [see Exhibits 3 and 4 to DAY'S Memorandum in Support of Motion to Set Aside Stay of Enforcement of Judgment Pending Petition for Certiorari].

It is true that this office has been associated in some of the cases brought against STURM, RUGER by out-of-state counsel, but what STURM, RUGER does not reveal is the fact that it has, on the other side, a defense team set up with unknown numbers of lawyers all over the country and with leading counsel in Chicago, backed by firearms experts and retired F.B.I. investigators across the nation to defend these cases rather than expend that money recalling the product. So, in addition to being injured by STURM, RUGER'S gun, the unfortunate victim must also face STURM, RUGER'S legal machinery in order to recover damages.[7]

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[7] Sturm, Ruger refers to the accident victims in its list of cases appearing in footnotes 18 and 19 as if they were bothersome gnats. While it might be bothersome to be sued, it would seem that if enough customers sustained serious injuries from a product, a reasonable manufacturer would recognize the failure of the product and do something about it. Since Sturm, Ruger has provided this Court with a list of names of accident victims which this writer has or does represent in footnotes 18 and 19 without furnishing any information about the nature of the accident and injury sustained, we will provide that missing information so this Court may make a balanced judgment on the validity of the claims and whether the legal system is abusing Sturm, Ruger.

(footnote continued on following page)

Finally, and most importantly, STURM, RUGER does not tell this Court its records reflect that this writer has offered, through interrogatories and otherwise, to withdraw all punitive damage claims if the manufacturer will recall the defective, old model single action revolvers. It prefers to litigate. As long as it maintains that attitude, it can hardly be heard to complain about the potential of future punitive damage awards. In the final analysis, all STURM, RUGER

Michael James Day, sustained a serious leg injury while unloading his uncocked revolver.

Edge & Malcom, two Air Force men, were injured by the same bullet which passed through Malcom's leg and struck Edge in the chest when Malcom's revolver went off in its holster while on safety and uncocked.

Brenda Mullins, sustained a serious leg injury when shot with a revolver she dropped while in safety and uncocked.

Mr. Killion, a heavy equipment operator, was shot in the leg and seriously crippled when he dropped his Ruger revolver which had the safety engaged and was uncocked.

Mr. Small, a trucker, lost the use of one of his arms when he dropped his uncocked Ruger revolver with the safety engaged and was shot in the arm.

Dr. Ferguson, a physician, sustained a serious leg injury resulting in drop foot when he dropped his uncocked Ruger revolver with the safety engaged and was shot in the leg.

Angela Kendrick, a seven year old girl, was shot through the eye and the bullet passed out the top of her head, blinding her on one side and paralyzing her body on the opposite side and caused serious brain damage when a friend of the family's was apparently unloading her father's revolver and it went off, shooting him in the leg and her in the eye.

Mr. Freeman, sustained serious leg injury when he dropped his uncocked revolver while the safety was engaged.

Mr. McDonald, a deputy sheriff, sustained a serious leg injury when he dropped his uncocked revolver with the safety engaged.

Mr. Welch, a paramedic, was killed when he dropped a friend's uncocked revolver and was shot in the abdomen while the safety was engaged.

James Shekell, a member of the United States Air Force, was injured in the leg when he dropped his uncocked revolver with the safety engaged.

Mr. Smith, the son of a Great Falls, Montana police officer, was shot in the hip joint when he dropped his father's uncocked revolver with the safety engaged.

Mrs. Martin's son was shot in the upper jaw with a .357 revolver resulting in procrastinated brain damage which eventually caused his death when a friend dropped his uncocked revolver with the safety engaged.

(footnote continued on following page)

has to do to avoid punitive damage claims is recall the defective revolvers it sold. It refuses to spend the money doing that in face of an accident record which would alarm even the most hardened manufacturer.

Another inaccuracy which appears in STURM, RUGER'S Brief is the statement on p. 4 that RUGER was precluded from urging DAY'S negligence "in spite of Alaska's adop-

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Mr. Hallmann, a lumberjack, lost his leg when his uncocked revolver went off in the holster, striking him in the leg, while in safety.

Mr. Barkwell, retired Air Force, sustained serious leg injury when he dropped his uncocked revolver with the safety engaged.

Charles Brown, lost one leg and sustained injury to the other leg when his uncocked revolver discharged in his holster as he was walking through the woods.

Roy David, an Alaskan native policeman, sustained an abdomen injury when he dropped his uncocked revolver with the safety engaged in the bottom of a boat. The bullet passed through his abdomen and went out his back.

Naomi Dodge, lost her son when he dropped his brother-in-law's uncocked revolver and was shot in the heart.

Dianne Oftedahl, was the Administrix of the Estate of Edward Hewitt. Mr. Hewitt was killed when a friend's uncocked revolver with the safety engaged went off in the holster and shot him in his chest.

Edgar Shields, an Air Force officer, was seriously injuried in the leg when his uncocked revolver with the safety engaged went off in the holster on a hunting trip.

Raymond Tritt, an Alaskan native, was seriously injured in the leg when his uncocked revolver with the safety engaged went off in the holster while he was on a hunting trip.

Paula Foster, was shot in the vagina by an uncocked .357 magnum revolver dropped by an acquaintance resulting in total hysterectomy to the 21 year old woman and serious leg complications.

Mr. and Mrs. Nix, lost their daughter when a friend dropped his uncocked revolver, shooting her in the chest and killing her.

Mrs. Sindelar, dropped her husband's uncocked revolver with the safety engaged and seriously injured her leg when it went off.

Donald Heaton, a retired police officer, sustained serious crippling leg injuries when he dropped his uncocked revolver with the safety engaged and was shot in the leg.

Mr. Trent, a police officer, was seriously injured in the leg when his uncocked revolver with the safety engaged went off in the holster.

Mr. Nicholson, a businessman and hunter, was seriously injured in the leg when his uncocked revolver went off in the holster while he was out

(footnote continued on following page)

tion of comparative fault principle in litigation of this type." This is products liability litigation. The defense of contributory negligence in products liabililty was not available in Alaska at the time this case was tried. As a matter of fact, only five months before this trial, the Alaska Supreme Court very clearly and concisely stated that proposition in *Butaud* v. *Suburban Marine & Sport. Goods, Inc.*, 543 P.2d 209, 211, 212 (Alaska 1975). It was not until after this case had been tried that the Alaska Supreme Court made comparative negligence applicable to strict products liability cases. *Butaud*

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hunting.

Mr. Hall, a mechanic, was seriously injured when his dog knocked his uncocked revolver with the safety engaged off the night table and it went off injuring his arm.

Mrs. Sullivan, lost her husband, a businessman, when he dropped his uncocked revolver and it went off, killing him.

Mr. Scalzo, sustained serious leg injury when his uncocked revolver with the safety engaged bumped a wall as he took the belt off, shooting him in the leg.

Lewis & Hudnall, a deputy sheriff and an accountant, were both injured by the same bullet as it passed through Lewis' knee and struck Hudnall in the hand, very seriously crippling Lewis and seriously injuring Deputy Hudnall's hand. The uncocked revolver was dropped and went off while in safety.

STURM, RUGER did not list the following cases being handled by this office:

Mr. Cain, was seriously injured when his uncocked revolver was dropped and fired in safety.

Mrs. Ervin, a 27 year old woman with two children, was rendered comatose and will be that way for the rest of her life as a result of her husband's uncocked Ruger revolver going off when he dropped it with the safety engaged.

Mr. Duel, was shot in the leg when his uncocked Ruger revolver with the safety engaged went off in the holster.

Ms. Black, was shot in the ankle by a large caliber Ruger revolver which was uncocked. When the gun beneath the seat of the driver of an automobile went off, it shot her in the ankle. She will eventually lose her foot.

Rev. Morgan, also a hunter, was seriously injured in the leg when his uncocked revolver with the safety engaged fell from the seat of his car and shot him in the leg on a hunting trip.

Mr. Schall, a dentist, dropped his uncocked revolver with the safety engaged and it shot him in the leg, seriously injuring him.

v. *Suburban Marine & Sport. Goods, Inc.*, 555 P.2d 42 (Alaska 1976). As the record reflects, the trial Court permitted STURM, RUGER, on cross-examination, to attempt to establish negligence on the part of DAY [Tr. III, 58, 60-61, 81, 98, 147, 155]. There simply was no evidence of contributory negligence.

PRESENTATION OF THE QUESTION BELOW

While the Alaska Supreme Court went ahead and ruled on the constitutionality of punitive damages because it was easy to rule on, the fact is that the question was not preserved at the trial stage. STURM, RUGER specifically consented to the punitive damage claim and used it to support evidentiary arguments throughout trial.

On February 23, 1973, DAY moved to amend its Complaint to include a claim for punitive damages [R., 18-21][1]. In response, RUGER filed a document labeled: NON-OPPOSITION TO MOTION TO FILE AMENDED COMPLAINT on March 28, 1973 [R., 24], stating:

> "The defendent does not oppose Plaintiff's Motion to Amend Complaint, dated February 23, 1973."

The only amendment was the inclusion of a punitive damage claim upon learning of the fact that other persons had been injured and the manufacturer had done nothing to correct the problem. RUGER *never* objected to the punitive damage claim nor asked that it be stricken before trial. On April 28, 1976, DAY moved to amend its punitive damage claim to claim in excess of $1 million [R., 974]. STURM, RUGER did not object. The question of the increased demand appearing in the Amended Complaint arose on the first day of trial and RUGER still did not object [Tr. I, 189-190]. RUGER'S non-opposition to the punitive damage claim was brought to its attention in pretrial discovery Orders when the Court ruled:

> "Defendent objects to answering this interrogatory. But despite Defendent's objection, this information will be provided for in this lawsuit which involves a prayer for punitive damages." [R., 397]

The information being sought was STURM, RUGER'S financial information, only admissible for the purpose of proving punitive damages. The Court went on to rule in another place in its Order:

> "Again, this suit involves a claim for punitive

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[1]The record is cited as it appears before the Alaska Supreme Court since the record has not been redone by the United States Supreme Court.

damages and such information is relevant and will be provided for the last seven years." [R., 397]

DAY'S counsel filed a Pretrial Memorandum dated April 14, 1976 [R., 818-836] which contained a section dedicated exclusively to punitive damages and their application to products liability cases. STURM, RUGER'S Pretrial Memorandum dated December 8, 1975 [R., 491-494] did not mention punitive damages, nor raise any question of their constitutionality. At the Pretrial Conference on February 13th, there was no mention of punitive damages nor objection, nor was there any mention of it at the Pretrial Conferences of March 19th, March 26th, April 8th, or April 20th. RUGER filed memoranda in which it used the punitive damage claim in attempts to keep out evidence of subsequent design changes [R., 973].

So, the trial Court proceeded to trial with STURM, RUGER'S written consent to try the punitive damage claim and without any question ever being raised against the punitive damages. In opening comment, DAY'S counsel told the jury that it intended to prove punitive damages [Tr. III, 25-28]. During trial, RUGER used the punitive damage claim to support an argument for the admission of certain types of defense evidence:

> "Additionally, the Plaintiff is claiming bad motive and reckless indifference to the interest of others. Evidence of the care with which the revolvers are manufactured is specifically admissible on this issue." [R., 1032].

Those arguments continued on throughout the trial with STURM, RUGER using the punitive damage claim as a vehicle to admit defense evidence which would not otherwise be admissible in a strict products liability case:

> "I think you're right, Your Honor, perhaps — if we were just talking about a strict products liability case. But we are talking about punitive damages." [Tr. VII, 96-97].

* * *

> "But more importantly, we get back to this issue of punitive damages. You know, he's — millions and millions of dollars. Well, are we in the exercise of due care or not? That's certainly going to be something the jury is going to consider relative to the issue of punitive damages. The next thing he's going to read — Bix is going to read, one of the next things, is John Kingsley, about all the money they make. We ought to be able to show with our witnesses that we are in the exercise of due care, you know, in this kind — in the instructions and where this could be done. For that reason alone, we're going to attempt to get the instructions in at a later time." [Tr. VII, 109].

By using those arguments, STURM, RUGER opened a flood gate of evidence which it wanted before the jury and which the Court would otherwise not have admitted. The Court specifically ruled in a written Order which was read to the jury:

> "The Court has repeatedly held that state of the art comparisons, quality control, care in manufacturing, consumer preference, etc. are not matters which are admissible to disprove defect.
>
> "If Plaintiff submits evidence in support of a punitive damage claim, all the above matters become relevant in defense to meet the claim of punitive damages." [R., 1115].

In fact, STURM, RUGER was permitted to ask any questions it wanted of its witnesses regarding the defenses it contended were related to punitive damages [for example, see Tr. X, 173-187; XI, 101-105, 110-112]. STURM, RUGER was permitted to elicit testimony from Mr. Ruger regarding the popularity of the gun, comparisons with other revolvers generally, the good character of the STURM, RUGER COMPANY, his good relationship with the public; all under the guise of defending the punitive damage claim it consented to litigating [Tr. XIV, 119-175].

At the end of the Plaintiff's case, RUGER made a brief statement that the evidence did not meet the requirements to prove punitive damages, but did not question the constitutionality or the validity of punitive damages [Tr. X, 219-220]. On May 24th, the day before the evidence concluded and after STURM, RUGER had used the punitive damage claim throughout the trial to support its arguments for the admissibility of evidence, a Memorandum of Law in Opposition to punitive damages was submitted to the Court but was apparently not filed that day [R., 1064-1072]. Constitutionality was barely mentioned in the memorandum. There was no motion which accompanied the memorandum, no hearing was asked for, nor argument made regarding the memorandum, nor was the trial Court asked to consider or rule upon it. The evidence ended on May 25th and RUGER made a motion for a directed verdict, briefly mentioning the May 24th memorandum — "a memorandum has been filed". But, the argument itself related almost entirely to whether the evidence was sufficient to establish punitive damages [Tr. XV, 152-153].

Following the verdict, RUGER filed a Motion for New Trial and for Judgment Notwithstanding the Verdict [R., 1193-1216] which did not mention the constitutionality or validity of punitive damages.

In fact, the Alaska Supreme Court did comment upon the constitutionality of punitive damages concluding that the constitutionality was well-established and passed over the issue briefly [see STURM, RUGER'S Appendix A, p. 13]. But, the fact is that the question was not preserved at the trial level. STURM, RUGER first consented to the claim for punitive damages, used the punitive damages claim throughout the entire trial as a vehicle for admission of evidence it wanted before the jury, never argued the constitutionality of punitive damages in an adversary context before the trial judge, and barely mentioned the constitutionality question in a memorandum which was filed, but not argued, either during or after trial in the post-trial motion stage. This Court should not permit a party to fully utilize a claim that it

consented to in its own defense to that extent, then having lost, raise the issue for the first time in an adversary context in an attempt to escape the effect of the award.

THE PETITION IS UNTIMELY

On April 6, 1979, the Alaska Supreme Court upheld the constitutionality of punitive damages [Appendix A, p. 13, Petitioner's Brief]. DAY petitioned for rehearing and after further briefing, the Alaska Supreme Court, on August 22, 1980, reinstated a portion of the punitive damage award. STURM, RUGER then filed a Petition for Rehearing reargueing the constitutionality question which was inappropriate under Alaska Appellate Rule 506. But, its Petition was denied October 13, 1980, via, an Order signed by the Alaska Supreme Court Clerk [Appendix A hereto]. The only thing which remained to be decided and the only question accepted by the Alaska Supreme Court, via, the October 13, 1980 Order, was whether attorney's fees were appropriate on the punitive damage award under Alaska Civil Rule 82. A one page opinion was subsequently rendered on April 24, 1981 [Appendix C to Petitioner's Brief]. Since the Alaska Supreme Court had already ruled on the question in *Haskins* v. *Shelden,* 558 P.2d 487 (Alaska 1976), there was little or no question as to the outcome of that decision. In any event, there was absolutely no constitutional question remaining before the Alaska Supreme Court after October 30, 1980. STURM, RUGER might argue that the constitutional question was not ripe after the April 6, 1979 decision, or was reinstated by the second opinion, but it certainly can not argue that the question was not ripe on October 13, 1980 when its Petition was denied. What remained was a housekeeping chore of straightening up the attorney's fees question, an issue which had no effect on the constitutional question.

This Court has stated:

> "Thus, the mere fact that a Judgment previously entered has been reinstated or revisited in an immaterial way does not toll the time within which review must be sought. Only when the lower court changes matters of substance, or resolves a genuine ambiguity, in a judgment previously rendered should the period within

> which an appeal must be taken or a petition for certiorari filed begin to run anew. The test is a practical one. The question is whether the lower court, in its second order, has disturbed or revisited legal rights and obligations which, by its previous judgment, had been plainly and properly settled with finality." *Federal Trade Comm.* v. *Minneapolis-Honeywell R. Co.*, 344 U.S. 206, 97 L.Ed. 245, 73 Sup. Ct. 245 (1952) at 97 L.Ed., p. 252.

See, also, Moore, *Federal Practice*, Vol. 12, §508.01(5):

> "The Court has frequently held that the policy underlying the requirement of finality is not frustrated by review of state court decisions of federal issues which finally determine matters separate and independent from the merits of the controversy which have not been finally adjudicated."

See, also, *Dept. of Banking* v. *Pink*, 317 U.S. 264, 87 L.Ed. 254, 63 Sup. Ct. 233 (1942); *Dickinson* v. *Petroleum Comm. Corp.*, 338 U.S. 507, 94 L.Ed. 299 (1950).

The timely filing of a Petition is a jurisdictional question which the Supreme Court has no power to alter or waive. *Toledo Scale Co.* v. *Computing Scale Co.*, 261 U.S. 399, 67 L.Ed. 719 (1919); *Rust Land & L. Co.* v. *Jackson*, 250 U.S. 71, 63 L.Ed. 803 (1919); *Matton Steamboat Co.* v. *Murphy*, 119 U.S. 412, 87 L.Ed. 1483 (1943).

The ninety (90) day period for filing this Petition pursuant to 28 U.S.C.A., §2101(c) has long since passed.

REASONS FOR DENYING THE WRIT

STURM, RUGER commences its argument for granting the writ on p. 6 by erroneously stating in footnote 5 that:

> "Somewhat ironically, Alaska had, until this case, neither statute *nor* decisional articulation of the punitive damage process. . ."

To the contrary, punitive damages were very well-established in Alaska prior to this case. Alaska clearly defined the concept by adopting the Restatement definition in *Bridges* v. *Alaska Housing Authority,* 375 P.2d 696 (Alaska 1962). That case was followed by *Nissen* v. *Hobbs,* 417 P.2d 250 (Alaska 1966); *Hash* v. *Hogan,* 453 P.2d 468 (Alaska 1969); and *Schafer* v. *Schnabel,* 494 P.2d 802 (Alaska 1972).

Punitive damages are as deeply rooted in the American and English common law as any rule of law. Almost 100 years ago the West Virginia Supreme Court traced the roots of punitive damages to the Bible in the case of *Mayer* v. *Frobe,* 22 S.E. 58 (W. Va. 1895).

> " 'If a man shall steal an ox or a sheep, or kill it, or sell it, he shall restore five oxen for an ox and four sheep for a sheep'. Exodous, c.22. In these judgments the principle of punitive damages assessed in proportion to the evil intent of the wrongdoer is declared established, and enforced for the benefit of the injured party and, in addition thereto, the offender had to make atonement for his sin or crime by suitable sacrifices." 22 S.E. at p. 61.

The justification for punitive damages was also considered by that Court:

> "Nor do I consider it a mere arbitrary rule prescribed by supreme authority, but it is founded on wisdom and justice, for the purpose of preventing, rather than punishing, wrong. It is universally recognized as an unequivocal truth that the greatest source of evil among men is a selfish disregard of the rights of others, the existence of which argumentively makes civil government

absolutely necessary for a man's felicity. To overcome and destroy this selfishness by rewards and punishments after the matter or measure of biblical justice, when properly enforced this rule has proven itself invaluable. Its effect is four-fold in its operation. As to the wrongdoer it is a double-edged sword: *First.* It requires him to make full reparation. *Second.* It punishes him in proportion to the maliciousness of his conduct. As to the sufferer. *First.* Acting as his protector, it fully compensates him for his loss. *Second.* As his avenger, it rewards him, in proportion to the wicked spirit of his adversary, for the obedient submission of his cause to its arbitrament. And, when strictly enforced, it stands as a continual and ever present menance to evil doers." 22 S.E. Rptr. 62.

In support of that ruling, the West Virginia court relied heavily upon decisions from this Court:

"Proceeding with the examination of the merits of this case, at the very threshold of its investigation, the question presents itself for determination whether this court, as to the matter of exemplary damages will be controlled by the case of *Pegram* v. *Stortz,* 31 W. Va. 220 (6 S.E. Rep. 485) followed by *Beck* v. *Thompson,* 31 W. Va. 459 (7 S.E. Rep. 447) or will be governed by the law as settled beyond controversy by the great bulk of English and American authorities, including the Supreme Court of the United States. In the 8th Edition of Sedgwick, *On Damages,* revised and issued since the case of *Pegram* v. *Stortz,* the law is stated as follows, to-wit:

" 'In actions of tort, when gross fraud, malice, or oppression appears, the jury are not bound to adhere to the strict line of compensation, but may, by a severer verdict, at once impose a punishment on the Defendent and hold him up as an example to the community.' 1 Sedg. Dam. (8th Ed.).

* * *

"The true doctrine on the subject, succinctly stated, and which should be generally received and strictly

adhered to, is contained in the opinion of Justice Grey in the case of *Railway Co.* v. *Prentice,* decided Jan. 3, 1893, and reported in 147 U.S. 101 (13 Sup. Ct. 261): 'In this court, the doctrine is well settled that in actions of tort the jury, in addition to the sum awarded by way of compensation for the Plaintiff's injury, may award exemplary, punitive, or vindictive damages, sometimes called smart money, if the Defendant has acted wantonly or oppressively, or with such malice as implies a spirit of mischief or criminal indifference to civil obligations. But such guilty intention on the part of the Defendant is required in order to charge him with exemplary or punitive damages." *The Amiable Nancy,* 3 Wheat., 546, 558, 559; *Day* v. *Woolworth,* 13 How. 363, 371; *Railroad Co.* v. *Quigley,* 21 How. 202, 213, 214; *Railway Co.* v. *Ames,* 91 U.S. 489, 493, 495; *Railway Co.* v. *Humes,* 115 U.S. 512, 521 (6th Sup. Ct. 110); *Barry* v. *Edmunds,* 116 U.S. 550, 562, 573 (6th Sup. Ct. 501); *Railway* v. *Harris,* 122 U.S. 597, 609, 610 (7th Sup. Ct. 1286); *Railway Co.* v. *Beckwith,* 129 U.S. 26, 36 (9th Sup. Ct. 207). 'Exemplary or punitive damages being awarded not by way of compensation to the sufferer, but by way of punishment of the offender and as a warning to others.' " 22 S.E. at p. 59.

The West Virginia Supreme Court also quoted *Barry* v. *Edmunds,* 116 U.S. 562 (6th Sup. Ct. 501) as follows:

" 'The Plaintiff is entitled to exemplary damages, calculated to vindicate his right, and protect him from future invasions.' " 22 S.E. at p. 61.

Finally, the Court in West Virginia pointed out:

"Besides the courts of England and the Supreme Court of the United States, nearly every state Supreme Court has held the doctrine of exemplary damages strictly as a punishment to be the true common law rule." 1 Sedg. Dam. §360 (22 S.E. 64).

A thorough discussion of the punitive damage concept, its

rationalization and history is found in Note, *Exemplary Damages In The Law of Torts,* 70 Harvard L.Rev. 517 (1957). The most thorough study of punitive damages in products liability, the history of the rule, its justification and rationalization was recently done by Professor Owen, *Punitive Damages In Products Liability Litigation,* 94 Mich. L.Rev. 1258 (1976). Owen commences Sec. 2 of his article at p. 1262 with the following observation:

> "The doctrine of punitive damages, with deep roots in ancient law and in medieval statutes, first received explicit recognition by the English Common Law in 1763. The doctrine was rapidly transported to America and by the middle of the 19th Century had gained substantial acceptance in this country. Although beset by a history of stormy controversy, the doctrine has become firmly established in the Common Law."

Footnotes 16 through 21 of that article point out ancient cases upholding punitive damages and the fact that once it is recognized that multiple damages are a form of punitive damages, they may be traced back through Babylonian law 4,000 years ago, were provided for in the Hittite laws of 1400 B.C., the Hebrew Covenant Code of Mosaic law 1200 B.C., in the Hindu Code and the early Roman Civil law beginning with the Twelve Tables of 450 B.C. He points out that the first English statutory provision for multiple damages appeared in 1275 and that the first case was in 1763, more than 200 years ago. Finally, he points out that the first reported decision on punitive damages in the United States was in 1784, almost exactly 100 years ago.

Professor Owen observes in footnote 23 that Appellate Courts of Australia, Canada, Ireland, and New Zealand have punitive damages, as well as Switzerland, Turkey, Greece, Norway and Mexico, and that they are common both in Federal Courts and in almost all of the State Courts in this country. Yet, STURM, RUGER, having produced a product that has seriously injured and killed hundreds of people which it refuses to recall, contends that this case should

abolish punitive damages because it has been assessed a punishment which has now been reduced from $3 million to $500,000, that a jury carefully computed based on the numbers of guns sold and the excess profit realized by failure to incorporate a functional safety [see Justice Burke's dissenting opinion, Appendix A, Petitioner's Brief]. STURM, RUGER goes so far as to argue that it should have been given advanced notice that it might be assessed punitive damages. The contention is meritless since it still refuses to recall the accident prone guns following this award.

STURM, RUGER falls in the category of Defendants described by Justice Jefferson in *Baptiste* v. *Superior Court of California,* 164 Cal. Rptr. 789 (1980) where he pointed out that the imposition of punitive damages was under widespread attack from *habitual Defendents,* but stated:

> "It seems abundantly clear, however, that punitive damages are an established part of our legal system, and that there is no indication of any present desire or tendency to abandon them."

This Court recently declined to consider the question of the constitutionality of punitive damages in *Gillham* v. *Admiral Corp.,* 523 F.2d 102 (6th Cir. 1975); cert. den. 424 U.S. 913, 96 Sup. Ct. 1113, 47 L.Ed. 2d 618 (1976). The California Court of Appeals has rejected the same constitutional arguments made by the same attorney making them here in *Fletcher* v. *Western Nat'l Life Ins. Co.,* 98 Cal. Rptr. 78, 96 (1970). That Court has rejected the constitional arguments in other cases as well. See, *Toole* v. *Richardson-Merrill, Inc.,* 60 Cal. Rptr. 398, 417 (1967):

> "The United States Supreme Court has considered and rejected arguments similar to those now urged upon us. In *United States* v. *Regan,* 232 U.S. 37, 34 Sup. Ct. 213, 58 L.Ed. 494, a civil action to recover a penalty for the commission of a public offense, the court stressed the civil nature of the action and pointed out that Civil Rules of Procedure rather than Criminal Rules are applicable [see, also, *U.S.* v. *Zucker,* 161 U.S. 475, 16

Sup. Ct. 641, 40 L.Ed. 777]. Here, respondent's action, although it demanded punitive damages as part of the relief sought, was purely civil in nature. The constitutional guarantees which appellant says it was denied are applicable in criminal cases but are not controlling in purely civil actions such as the case before us. It follows that the award of penal damages made under Civil Rules of Procedure did not violate any constitutional right of the appellant."

The same argument was rejected the third time in *Eagen* v. *Mutual of Omaha Ins. Co.*, 133 Cal. Rptr. 899, 914 (1976). It was also rejected by the Alaska Supreme Court in this case, and was more recently rejected by the Wisconsin Supreme court in the very well-reasoned decision, *Wangen* v. *Ford Motor Co.*, 294 N.W.2d 437 (Wisc. 1980). That case traced the roots of the punitive damage concept to ancient law, discussed the history of punitive damages, the function of the doctrine, and analyzed its use in modern society. The Wisconsin Court concluded that punitive damages were very useful and appropriate in products liability cases.

> "The law giving exemplary damages is an outgrowth of the English love of liberty regulated by law. It tends to elevate the jury as a responsible instrument of government, discourages private reprisals, restrains the strong, influential, and unscrupulous, vindicates the right of the weak, and encourages recourse to and confidence in the courts of law by those wronged or oppressed by acts or practices not cognizable in or not sufficiently punished by the criminal law." 294 N.W. 2d at 437.

The *Wangen* Court also points out in footnote 17 that the task force which developed the Model Uniform Product Liability Act retained the concept of punitive damages.

In 1897, this Court stated:

> "It is a well-established principle of the common law that, in actions of trespass and all actions on the case for torts, a jury may inflict what are called exemplary,

> punitive, or vindictive damages upon a defendant, having in view the enormity of his offense rather than the measure of the compensation to the plaintiff. We are aware that the propriety of this doctrine has been questioned by some writers, but if repeated judicial decisions for more than a century are to be received as the best exposition of what the law is, the question will not admit argument. By the common as well as by the statute law men are often punished for aggravated misconduct or lawless acts, by means of a civil action, and the damages inflicted by way of penalty or punishment given to the party injured." *Scott* v. *Donald,* 165 U.S. 58, 41 L.Ed. 632, 637 (1897).

STURM, RUGER argues that punitive damages are unconstitutional because juries are permitted to set the amount to be awarded. But, juries frequently have to compute damages without a specific yardstick. For example: awards for pain and suffering, for lost consortium, and etc. are matters which juries regularly decide[9]. In order to sustain the burden in a punitive damage claim, the claimant must prove outrageous conduct.

> "Such as acts done with malice or bad motives or a reckless indifference to the interest of another." *Bridges* v. *Alaska Housing Authority,* 375 P.2d 696, 702 (Alaska 1962).

That is similar to proving other types of damages such as pain and suffering. That rule of law was adopted by Alaska in the *Bridges, supra,* case from the Restatement.

In this case, the Alaska Supreme Court cited that rule of law and acknowledged that the Plaintiff had met its burden and that the trial judge had properly instructed the jury and cautioned them to exercise their discretion with reason and not to be motivated simply by prejudice with regard to the

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[9]If Sturm, Ruger did not trust a jury to make the decision, it should not have demanded one — it was Sturm, Ruger, not Day, who demanded the jury in this case [R. 4].

punitive damage question [Appendix A, p. 13, Petitioner's Brief]. The verdict itself reflects a lack of vagueness. It is a computation by multiplying the numbers of guns sold by the $1.93 it took to correct the defect, founded on STURM, RUGER's admission that it could have corrected the gun in the initial manufacturing stages if it had tried. The jury concluded that the appropriate punishment was the $1.93 per gun excess profit RUGER made by failing to incorporate the safety [see Justice Burke's dissent, Appendix A].

CONCLUSION

The Petition should be denied at the outset for having not been raised at the trial level and for being untimely. If the Court considers this Petition, it should be denied based on the overwhelming authority both from this Court and the vast majority of the State Supreme Courts, as well as almost all common law countries. The doctrine is well-established and well-accepted except by those like STURM, RUGER who are habitual defendants and who prefer to litigate rather than accept public responsibility to those customers who patronize its products. Awards of punitive damages, while left to juries' discretion, are no different than many compensatory damage awards juries are bound to make and are civil rather than criminal; therefore, do not raise constitutional questions.

THE PETITION SHOULD BE DENIED.

Respectfully submitted,

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WHITING & ROSIE
Attorney for Respondent.

APPENDIX A

In the Supreme Court of the State of Alaska

STURM, RUGER & CO., INC.,
A Connecticut Corporation,

Appellant and Cross-Appellee,

vs. File Nos. 3092 & 3135

MICHAEL JAMES DAY,

Appellee and Cross-Appellant.

Superior Court No. 4FA72-669 CIV

Before: Rabinowitz, Chief Justice, Connor and Burke, Justices, and Dimond, Senior Justice. [Matthews, Justice, not participating.]

ORDER

On consideration of the petition for rehearing filed August 27, 1980 by Day, and the "petition to clarify opinion and for rehearing" lodged September 2, 1980 and filed September 19, 1980 by Sturm, Ruger, IT IS ORDERED:

1. The petition filed by Day is granted, and an opinion will follow addressing the question raised therein.

2. Insofar as Sturm, Ruger's petition requests that footnote 5 on page 7 of the opinion filed August 22, 1980 be altered, the petition is denied.

3. The question of when appellee Day must elect whether to accept a remittitur is a matter to be determined within the discretion of the Superior Court.

4. The petition for rehearing filed by Sturm, Ruger is denied.

Entered by direction of the court at Anchorage, Alaska, October 13, 1980.

ROBERT D. BACON, CLERK